Perbadanan Menteri Besar Kelantan v Syarikat Perusahaan Majubina Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO D-02–2031–09 OF 2013
ABANG ISKANDAR, BADARIAH SAHAMID AND MARY LIM JJCA
2 JUNE 2016

Contract — Damages — Quantum — Trial court allowed respondent's claim for loss and expense, damages of blacklisting and interest — Whether respondent entitled to damages

Contract — Termination — Validity — Appellant and respondent entered into contract — Appellant terminated contract — Respondent filed action against appellant — Trial court found in favour of respondent — Appellant appealed against decision — Whether termination notice valid — Whether termination in accordance with terms of contract — Whether termination of contract valid

The appellant appointed the respondent under a contract ('the contract') to carry out earth works and site preparation in relation to a housing project in Kota Bharu, Kelantan. For that purpose, the appellant had also appointed another company namely Rekajati Arkitek as the superintending officer ('SO') of the project. The project which was supposed to be completed in eight weeks was extended to over almost five years due to four variation orders, two Architect Instruction ('AIs') and four extensions of times ('EOT') issued by the appellant. The respondent alleged that the second AI issued by the SO did not carry a corresponding EOT which was needed by the respondent to renew its insurance coverage. The respondent claimed that, without such coverage, it could not continue with the works. The respondent alleged that, instead of issuing the EOT certificate, the SO had unilaterally and without any reasonable ground terminated the contract. Consequently, the respondent filed a claim for damages arising from an alleged unlawful termination of contract by the appellant. The trial judge found in favour of the respondent, hence this appeal. The appellant submitted that the termination of the contract was lawful as the notice requirement in cl 51 of the contract was purely directory and not fundamental. Further, there was evidence of the appellant's earlier notices, and the fact that the respondent had itself stopped working on the site despite knowing the consequences of its actions. On the other hand, the respondent submitted that the notice of termination was invalid because of non-compliance of cl 51, that is, no default was specified in the notice. The respondent further submitted that the earlier warning letter of 1 February 2009 could not be relied on as it was issued by project management consultant

('PMC') and not by SO. The central issues for court's consideration were on the matter of validity of the termination and also on the quantum of the claim.

Held, allowing the appeal in part:

(1) Pursuant to cl 51(a), the appellant has a right to terminate the contract but the appellant was obliged to first of all issue a notice of default through the SO. The notice requirements were not purely directory, failure to specify the particular default that the respondent was said to be in breach of was a material non-compliance of cl 51. There was no indication of any intention to determine under cl 51 anywhere in the PMC's memos as well as its letters. Further, since the PMC was not the SO, the letter sent by the PMC was not notice within the meaning of cl 51. Thus, the termination notice dated 9 June 2010 was invalid for non-compliance with cl 51 of the conditions of contract (see paras 15–19).

(2) The learned High Court judge had failed to take into consideration that the respondent's claim for payment of progress claim for the sum of RM213,971 was inherently improbable and incorrect. This sum was actually the difference between the revised contract sum of RM1,169,529 and the amount paid to date, which was RM955,558. This amount was not reflective of any work done but was purely arithmetical calculation of the full sum of the contract less amounts paid. The amount of RM213,971 for work done could only be arrived at if the respondent fully completed the works. Since it was undisputed that the respondent never completed the works, it could not be entitled to the balance sum of the contract price without more (see paras 22–23).

(3) Clause 44 of the contract provides for a delay related claim. It was not a claim independent of delay. Before a claim for loss and expense may be properly and validly raised under cl 44, such loss and expense must be a direct result of the delay caused only by the grounds recognised under cll 43(c), (f) or (i) of the contract. In this case, the reason given by the respondent relating to waiting for instructions on the removal of excavated organic materials was not supported by the evidence. Further, based on the evidence, none of the respondent's claims were properly within cl 44 of the contract. These material factors were not considered, adequately or at all by the trial judge. Such failure was wrong and it is trite principle that this then warranted appellate intervention (see paras 31, 43 & 46)

(4) In this case, the respondent had claimed RM1m for general damages whereas at the trial, the respondent had sought the same sum as exemplary damages. Aside from the fact that a claim for exemplary damages must be specifically pleaded, the court was of the view that there was no basis for this award. The court disagreed with the respondent that

it ought to infer that the respondent had been blacklisted by the Government of Kelantan or by the appellant. This was a matter of evidence and nothing was led at the trial to prove the right to this claim (see para 47).

[Bahasa Malaysia summary

Perayu melantik responden dibawah satu kontrak ('kontrak') untuk menjalankan kerja-kerja tanah dan persediaan tapak berkaitan dengan projek perumahan di Kota Bharu, Kelantan. Bagi tujuan itu perayu juga melantik satu lagi syarikat iaitu Rekajati Arkitek sebagai pegawai penguasa ('PP') projek. Projek yang sepatutnya disiapkan dalam masa lapan minggu telah dilanjutkan kepada hampir lima tahun disebabkan oleh empat perintah variasi, dua arahan arkitek ('AI') dan empat lanjutan masa ('EOT') yang dikeluarkan oleh perayu. Responden mendakwa bahawa AI kedua yang dikeluarkan oleh PP tidak mempunyai EOT yang sepadan yang mana diperlukan oleh responden untuk memperbaharui perlindungan insuransnya. Responden mendakwa bahawa, tanpa perlindungan itu, ia tidak boleh menyambung perkerjaannya. Responden mendakwa bahawa, bukannya mengeluarkan sijil EOT, PP telah secara sebelah pihak dan tanpa apa-apa alasan munasabah menamatkan kontrak. Akibatnya, responden memfailkan tuntutan ganti rugi berbangkit daripada dakwaan penamatan kontrak secara salah oleh perayu. Hakim bicara membuat dapatan berpihak kepada responden, maka rayuan ini. Perayu mengemukakan bahawa penamatan kontrak adalah sah kerana notis keperluan dalam klausa 51 kontrak adalah direktori semata-mata dan bukanlah asas. Selanjutnya, terdapat keterangan mengenai notis awal perayu, dan fakta bahawa responden sendiri telah berhenti bekerja di tapak walaupun mengetahui akan akibat tindakannya. Sebaliknya, responden mengemukakan bahawa notis penamatan adalah tidak sah kerana ketidakpatuhan terhadap klausa 51, iaitu, tiada keingkaran telah dinyatakan dalam notis itu. Responden selanjutnya mengemukakan bahawa surat amaran awal bertarikh 1 Februari 2009 tidak boleh disandarkan kerana ia dikeluarkan oleh perunding pengurusan projek ('PPP') dan bukan oleh PP. Isu utama untuk pertimbangan mahkamah adalah atas perkara kesahan penamatan dan juga terhadap kuantum tuntutan.

Diputuskan, membenarkan sebahagian rayuan:

(1) Menurut klausa 51(a), perayu mempunyai hak untuk menamatkan kontrak tetapi perayu bertanggungjawab pertamanya untuk mengeluarkan notis keingkaran melalui PP. Notis keperluan tidak sepenuhnya direktori, kegagalan untuk menyatakan keingkaran tertentu bahawa responden dikatakan melanggar adalah ketidakpatuhan material klausa 51. Tiada tanda menunjukkan apa-apa tujuan untuk menentukan dibawah klausa 51 di mana-mana didalam memo PPP begitu juga suratnya. Selanjutnya, oleh kerana PPP bukanlah PP, surat yang

dikeluarkan oleh PPP bukanlah notis didalam maksud klausa 51. Maka notis penamatan bertarikh 9 Jun 2010 adalah tidak sah kerana ketidakpatuhan terhadap klausa 51 syarat kontrak (lihat perenggan 15–19).

(2) Hakim Mahkamah Tinggi yang bijaksana telah gagal untuk mempertimbangkan bahawa tuntutan responden untuk bayaran tuntutan kemajuan sebanyak RM213,971 adalah memang mustahil dan tidak betul. Jumlah itu sebenarnya adalah perbezaan antara jumlah kontrak disemak semula sebanyak RM1,169,529 dan jumlah dibayar sehingga kini, iaitu RM955,558. Jumlah ini tidak mencerminkan apa-apa kerja yang disiapkan tetapi adalah pengiraan arithmetrik semata-mata daripada jumlah penuh terhadap jumlah kontrak yang dibayar kurang. Jumlah RM231,971 untuk kerja yang disiapkan hanya boleh digunakan sekiranya responden menyiapkan kerja sepenuhnya. Memandangkan ia tidak dipertikaikan bahawa responden tidak pernah menyiapkan kerja, ia tidak berhak mendapat jumlah wang baki daripada harga kontrak (lihat perenggan 22–23).

(3) Klausa 44 kontrak memperuntukkan untuk tuntutan berkaitan kelewatan. Ia bukanlah tuntutan yang bebas daripada kelewatan. Sebelum satu tuntutan untuk kerugian dan perbelanjaan boleh dibangkitkan dengan wajar dan sah dibawah klausa 44, kerugian dan perbelanjaan sedemikian hendaklah menjadi akibat langsung daripada kelewatan disebabkan oleh hanya alasan yang dinyatakan dibawah klausa 43(c), (f) atau (i) kontrak. Dalam kes ini, sebab yang diberikan oleh responden berkaitan dengan menunggu arahan mengenai pengalihan bahan organik yang digali tidak disokong oleh keterangan. Selanjutnya, berdasarkan keterangan tiada satu pun tuntutan responden adalah sahih dalam klausa 44 kontrak. Faktor material ini tidak dipertimbangkan, secukupnya atau sama sekali oleh hakim bicara. Kegagalan sedemikian adalah salah dan ia adalah prinsip nyata dengan itu mewajarkan campur tangan mahkamah rayuan (lihat perenggan 31, 43 & 46).

(4) Dalam kes ini, responden menuntut RM1 juta untuk ganti rugi am sedangkan sewaktu perbicaraan, responden telah memohon jumlah yang sama sebagai ganti rugi teladan. Selain daripada fakta bahawa tuntutan untuk ganti rugi teladan hendaklah diplidkan dengan spesifik, mahkamah berpendapat bahawa tiada asas untuk award ini. Mahkamah tidak bersetuju dengan responden bahawa ia harus membuat kesimpulan bahawa responden telah disenarai hitam oleh Kerajaan Kelantan atau oleh perayu. Ini adalah perkara berkaitan keterangan dan tiada apa yang dibawa sewaktu perbicaraan untuk membuktikan hak untuk tuntutan ini (lihat perenggan 47).]

Notes

For a case on quantum, see 3(3) *Mallal's Digest* (5th Ed, 2015) para 4775.
For cases on validity, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 7096–7109.

Cases referred to

Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor [2008] 4 MLJ 157, CA (refd)
Perbadanan Pembangunan Pulau Pinang v Trikkon Construction Sdn Bhd [2012] 2 MLJ 28, CA (refd)
Photo Production Ltd v Securicor Transport Ltd [1980] 1 All ER 556, HL (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360; [1990] 1 CLJ 133, HC (refd)

Appeal from: Civil Suit No 22–35 of 2011 (High Court, Kota Bharu)

Sulaiman Abdullah (Raja Ahmad Mohzamuddin bin Raja Mohzam and Azuan Mohamad with him) (Adli Aznam & Akram) for the appellant.
Zamzuri Mohd Hussin (Foo Say Ghee & Zamzuri) for the respondent.

Mary Lim JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the learned High Court judge who had allowed the respondent's claim for damages arising from an alleged unlawful termination of contract. After hearing respective counsel and upon careful consideration of the law and the facts as set out in the record of appeal, we unanimously allowed the appeal in part. Having then given our broad reasons for our decision, these are our reasons in full.

FACTUAL BACKGROUND

[2] The appellant appointed the respondent to carry out earth works and site preparation in relation to a housing project at Lot PT 2403, Mukim Mahang West, Daerah Kok Lanas, Jajahan Kota Bahru, Kelantan. The terms and conditions of the contract are as specified in Contract No PMBK (KL) 2005-K1 dated 2 February 2005 based on a PWD Standard Form 203A (Rev 10/83). The appellant appointed a company known as Rekajati Project Management Sdn Bhd to administer, handle and supervise the contract. It also appointed three other companies, Perunding RSB, HAH Assoc and Rekajati Arkitek respectively as the civil engineer, quantity surveyor and the architect. Rekajati Arkitek was also appointed the superintending officer ('the SO') for the project.

[3] Initially, the contract was for a sum of RM398,822 with completion targeted in eight weeks ending 4 June 2005. After commencement of works,

four variation orders, two architect instructions ('AIs') and four extensions of times ('EOT') were issued. This led to an increase in the contract sum to RM1,169,530.23 and works which stretched over almost five years.

[4] The second AI issued on 15 March 2010 did not carry a corresponding EOT. The respondent claimed that it needed this EOT in order to renew its insurance coverage. Without such coverage, the respondent claimed that it could not continue with the works. Instead of issuing the EOT certificate, the respondent claimed that the SO unilaterally and without any reasonable ground, terminated the contract through letter dated 9 June 2010. The respondent further claimed that this termination was not made in good faith as it was made in order to avoid the appellant's liability to pay for idling time. It claimed that it consequently suffered hardship and losses. A claim for a sum of RM2,561,189 as the balance of payment due together with idling costs was filed.

[5] The respondent's claim was disputed. According to the appellant, the respondent had failed to complete the project despite the time extensions. It claimed that the respondent delayed the project for the purpose of getting variation orders which would result in a higher contract sum. As for the final EOT applied for after the second AI was given on 15 March 2010, the appellant explained that this could only be issued after the other consultants had given their input.

[6] On the claim for idling time, the claim was disputed on the basis of non-compliance with the contractual requirements, lack of supporting documents and the non-verification by the project consultants and by the appellant. Such costs were also not claimable because they were occasioned by the appellant themselves. The appellant further alleged that the claim was premature under cl 54 of the conditions of contract in that the respondent ought to have referred the matter to arbitration before filing the present claim.

DECISION OF THE HIGH COURT

[7] The claim went to trial with both parties adducing oral and documentary evidence. Thereupon, the learned High Court judge disagreed with the appellant and allowed the respondent's claim. First, the High Court found that cl 54 did not apply as the parties, especially the appellant, had already taken 'fresh steps' in the suit. These steps indicated that the appellant was agreeable to litigating instead of arbitrating the dispute.

[8] Next, the High Court found the termination of contract was invalid principally because the notice of termination issued under cl 51 failed to state the reasons or basis for the termination. It was the view of the learned High

Court judge that this failure amounted to a breach as cl 51 required the defaults to be identified. The court further found that the termination was invalid because the SO had failed to notify the respondent of its defaults. The respondent had relied on the cases of *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556 and *Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor* [2008] 4 MLJ 157 to say that the right to terminate arises only where there is failure to rectify after such notification is given. Since the respondent was not given this opportunity, the High Court agreed with the respondent that the termination was thereby, invalid.

[9] On the question of damages, the High Court allowed the respondent's claims for work done and for idling costs upon being satisfied that sufficient evidence had been led to prove these various heads of claim and because the claims were in accordance with the terms and conditions of contract. The High Court further awarded a sum of RM50,000 as general damages when the respondent was 'blacklisted' upon termination of the contract.

ISSUES RAISED IN THIS APPEAL

[10] The appellant was dissatisfied with the above decision and it consequently appealed. Before us, the appellant raised the following complaints:

(a) that the learned High Court judge erred in law and in fact in holding that the appellant was in breach in terminating the contract;

(b) that the learned High Court judge erred in law and in fact in allowing the respondent's claim for balance of the contract price;

(c) that the learned High Court judge erred in law and in fact in allowing the respondent's claim for loss and expense caused by delays under cl 44 of the conditions of contract; and

(d) that the learned High Court judge erred in law and in fact in allowing the respondent's claim for interest at the rate of 8%pa.

[11] These four complaints may be condensed into two central issues, one concerning the validity of the termination while the other is really about the quantum of the claim.

OUR DECISION

Validity of the termination

[12] On the first issue of the lawfulness of the determination, this requires the construction of cl 51 of the conditions of contract. Clause 51 allows the appellant, as employer to determine the respondent's employment:

> 51. Determination of contractor's employment
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> (a) Without prejudice to any other rights or remedies which the Government may possess if the Contractor shall made default in any one or more of the following respects that is to say:
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> (i) if he without reasonable cause suspends the carrying out of the whole or any part of the Works before completion, or
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> (ii) if he fails to proceed regularly and diligently with the Works, or
>
> (iii) if he fails to execute the Works in accordance with this Contract or persistently neglect to carry out his obligations under this Contract, or
>
> (iv) if he refuses or persistently neglects to comply with a written notice from the SO to remove and replace any defective work or improper materials or goods, or
>
> (v) if he fails to comply with the provisions of Clause 27(a) and (b) hereof;
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> then the SO may give to him a notice by registered post or by recorded delivery specifying the default, and if the Contractor shall either continue such default for fourteen (14) days after receipt of such notice or shall at any time thereafter repeat such default (whether previously repeated or not) then the Government may thereupon by a notice sent by registered post or by recorded delivery determine the employment of the Contractor under this Contract.

[13] Learned counsel for the appellant made two primary arguments on this issue. First, counsel submitted that the learned High Court judge was erroneous in finding that the termination was unlawful as the notice requirement in cl 51 is purely directory and not fundamental. Its main intention, meaning and purpose is to require the respondent to remedy. Second, there was evidence of the appellant's earlier notices, and the fact that the respondent had itself stopped working on site with effect from 11 May 2010 despite knowing the consequences of its actions. Despite the architect's instruction No 2 dated 15 March 2010 for the respondent to continue with the works, the respondent vide its letter dated 16 May 2010 informed that it was going to stop work based on the lack of insurance cover. This showed that the respondent was fully aware of the consequences of its action and it is now estopped from raising the issue of no notice to remedy default. The respondent's communications with the project management consultant or PMC, that is, Rekajati Project Management Sdn Bhd instead of Rekajati Arkitek, the SO also meant that the respondent could not now rely on

non-compliance with the procedures as provided under the contract since it, too had not been following those same procedures.

[14] The respondent submitted that the notice of termination is invalid because of non-compliance of cl 51. No default was specified in the notice. Furthermore, the earlier warning letter of 1 February 2009 could not be relied on as it was issued by PMC and not by the SO.

[15] In our view, it is quite clear from a reading of cl 51 that while the appellant has a right to determine the contract for any of the reasons or defaults set out in cll 51(a)(i)–(v), it is obliged to first of all, through the SO, issue a notice of default. The respondent is given 14 days to get its act together, to bring its work up to speed or deal with any of the other complaints identified by the appellant or SO. The object of such a notice is to warn the respondent of the possibility of drastic action of determination of contract. At the same time, it affords the respondent an opportunity to remedy the particular default complained of. Once such a notice has been issued, then the appellant is entitled to determine the employment of the respondent without further notice where the respondent either continues in the default or subsequently repeats the default. In view of the detrimental and sometimes referred to as the 'draconian' step as it serves to bring the contract to an end, there must also be strict compliance of cl 51.

[16] We agree with the findings of the learned High Court judge that the failure to specify the particular default that the respondent is said to be in breach of is a material non-compliance of cl 51. Bearing in mind that the purpose behind the issuance of the notice is to bring the particular default to the attention of the respondent so that it may be addressed or remedied, or not repeated, it would be quite impossible for this to take place if the default is not identified to start with. It is not for the appellant to say that just because the respondent may be aware of the particular default that it is exempted from spelling out the default in the notice. In as much as the notice is a pre-requisite to the right to determine the contract, so are the contents of that notice. We cannot agree with the appellant's proposition that the notice requirements are purely directory, certainly not after appreciating the intent and circumstances under which such a notice may be issued.

[17] We have further examined PMC's memos dated 4 January 2009 and 11 January 2009 as well as its letters dated 15 January 2009 and 2 December 2009. None of these memos and letters drew the attention of the respondent to cl 51. Certainly, there was no indication of any intention to determine under cl 51 anywhere in these documents. We find that failure both material and serious, and quite outside the scope of cl 51.

[18] For the same reasons, we further find that the appellant cannot rely on the earlier letter sent by the PMC, Rekajati Project Management Sdn Bhd. The PMC is not the SO. Rekajati Arkitek is. Therefore, the letter sent by the PMC is not a notice within the meaning of cl 51 that the appellant may rely on to cite a continuous or a repeated breach.

[19] Under such circumstances, we must agree with the learned High Court judge that the termination notice dated 9 June 2010 is invalid for non-compliance with cl 51 of the conditions of contract.

Quantum

[20] Coming next to the matter of quantum of damages, we however, do not find ourselves in agreement with the learned High Court judge. In that respect, we find that His Lordship has fallen into error in allowing the following claims of the respondent and such error merits appellate intervention:

(a) claims for loss and expense or idling claims;

(b) damages of blacklisting; and

(c) interest at 8%pa from the date of decision to the date of realisation.

[21] On the claim for payment of progress claim No 16 for the sum of RM213,971, this claim was allowed on the ground that it was unchallenged. The learned High Court judge found that the PMC had recommended payment of this progress claim after it had agreed with the respondent's reasons for extensions of time. The main reason for the EOT application was the delay by the PMC in issuing instructions on the location for disposing organic fill which had been excavated from the site. Apparently, the site identified for such disposal was full and a new site had to be located. This issue was raised at several site meetings, namely site meetings 6/2010, 7/2010 and 8/2010. The appellant did not challenge the minutes of the site meetings. Given that it was the party that prepared and maintained those minutes, the contents should stand uncontroverted.

[22] We agree with learned counsel for the appellant that the learned High Court judge had failed to take into consideration that the respondent's claim here was inherently improbable and incorrect. What the trial court failed to appreciate is that this sum was actually the difference between the revised contract sum of RM1,169,529 and the amount paid to date, which was RM955,558 leaving a sum of RM213,971 as the balance contract value. This can be seen from the statement of claim and from the explanatory evidence of SP1, the respondent's managing director. We agree with the appellant that this amount was not reflective of any work done but was a purely arithmetical calculation of the full sum of the contract less amounts paid. As a claim for

work done, the respondent was required to prove that the work done was indeed carried out and that such work was of the value claimed in the statement of claim.

[23] The amount of RM213,971 could only be arrived at had the respondent fully completed the works. Since it is undisputed that the respondent never completed the works, it cannot be entitled to the balance sum of the contract price without more. Evidence must be led to prove the value of work done. One such piece of evidence would be the respondent's own final account prepared and submitted by the respondent upon the appellant's request after the contract was determined. An examination of that final account reveals that it has made no mention of such progress claim or that the sum was outstanding. Progress claim No 16 was also not tendered in evidence. Under such conditions, we cannot agree with the learned High Court judge that the respondent would be entitled to this sum.

[24] On the loss and expense claims or idling costs, all three claims under this head of damage were allowed. The learned High Court judge agreed with the respondent that it was entitled to such costs under cl 44 of the conditions of contract. The trial court found that the appellant had acknowledged these claims as reflected in the minutes of site meetings and that these claims had been verified by HAH Assoc as delay expenses under cl 44.

[25] Having examined cl 44, with respect, we find that we again, cannot agree with the learned High Court judge. Contrary to the decision of the court below that the respondent is entitled to all the loss and expense claims because there is delay, the converse is actually the correct position. The right to claim for direct loss and expense under cl 44 in the event of delay does not arise in every instance of delay. Delay does not per se or in itself result in a claim for loss and expense. The parties have specifically agreed that the right to such a claim is dependent on several pre-qualifications and this is evident from the terms of cl 44:

> If the regular progress of the Works or any part thereof has been materially affected by reason as stated under Clause 43(c), (f) or (i) hereof (and no other), and the Contractor has incurred direct loss and/or expense for which he would not be reimbursed by a payment made under any other provisions in this Contract, then the Contractor shall within one (1) month of the occurrence of such event or circumstance give notice in writing to the SO of his intention to claim for such direct loss or expense together with an estimate of the amount of such loss and/or expense, subject always to Clause 48 hereof.

[26] First of all, the recognised category delay must materially affect the regular progress of the work. That is a matter of degree and quite obviously one of evidence. Sufficient evidence must be placed before the court to entitle the respondent to this item of claim.

[27] Second, the cause or reason for the affectation of regular progress of work which is manifested in a delay in the progress must be that which 'is stated under cll 43(c), (f) or (i) hereof (and no other)'. Clause 43 recognises a substantial list of causes or reasons for delay as justifying an application for EOT. However, cl 44 only recognises three of such reasons as warranting a claim for direct loss and expense, that is delays under cll 43(c), (f) and (i):

> *43. Delay and Extension of Time*
>
> Upon it becoming reasonably apparent that the progress of the Works is delayed, the Contractor shall forthwith give written notice of the causes of delay to the SO and if in the opinion of the SO the completion of the Works is likely to be delayed or has been delayed beyond the Date for Completion stated in the Appendix or beyond any extended Date for Completion previously fixed under this Condition:
>
> (a) ...
>
> (b) ...
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> (c) by reason of directions given by the SO, consequential upon dispute with neighbouring owners provided the same is not due to any act, negligence or default of the Contractor or any Subcontractor, nominated or otherwise, or
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> (d) by reason of the Contractor not having received in due time necessary instructions, drawings, levels or instructions in regard to the nomination of sub-contractors and/or supplies provided in this Contract, from the SO due to any negligence or default of the SO and for which he shall have specifically applied in writing on a date which having regard to the Date of Completion stated in the Appendix to this Conditions or to any extension of time then fixed under this Conditions, was neither unreasonably distant from nor unreasonable close to the date on which it was necessary for him to receive the same, or
>
> (e) by delay on the part of artists, tradesmen or others engaged by the Government in executing work not forming part of his Contract, ...

[28] Third, the loss and expense must be direct loss or expense which 'would not be reimbursed by a payment made under any other provisions in this Contract'. In other words, it is not an indirect loss or expense. This is again, a question of fact.

[29] Fourth, notice of such a claim must be made within one month from the occurrence of the event or circumstance. Together with the notice, the

respondent must provide proof of such loss and expense. The notice requirements have been construed to be strict requirements which must be met before a claim arises as decided by this court in *Perbadanan Pembangunan Pulau Pinang v Trikkon Construction Sdn Bhd* [2012] 2 MLJ 28.

[30] Lastly, the claim is subject to cl 48 on the matter of final certificate. The respondent is required to have submitted full details of all its claims together with supporting documents within three months after practical completion of the works. Clause 48(d) specifically requires the respondent to prepare a declaration or a certificate signed by the Director General of Labour, 'to the effect that the workmen who have been employed by the Contractor on the Works, including workmen employed by sub-contractors, whether nominated or otherwise (including 'labour only' sub-contractors) have received all wages due to them in connection with such employment, and that all dues or contributions under the Employment Ordinance, the Employee's Social Security Act, the Employee's Provident Fund Ordinance and the other laws relevant to the employment of workmen, have been paid'.

[31] In short, cl 44 provides for a delay related claim. It is not a claim independent of delay. Before a claim for loss and expense may be properly and validly raised under cl 44, such loss and expense must be a direct result of the delay caused only by the grounds recognised under cll 43(c), (f) or (i).

[32] In the instant case, the respondent made three claims for loss and expense. Once we examine those claims, it will quickly become evident that the High Court was clearly wrong in having allowed the claims. The respondent's claims are as follow:

(a) first claim of RM511,218 dated 5 March 2007 for the idling period of 140 days from 1 August 2006–21 January 2007;

(b) second claim of RM1,165,000 dated 28 March 2010 for the idling period of 446 days from 22 September 2008–18 March 2010; and

(c) third claim of RM125,000 dated 13 July 2010 for the idling period of 50 days from 19 March 2010–13 June 2010.

There was another fourth claim of RM126,000 for 24 days but no evidence of this claim was adduced.

[33] For the purpose of considering whether the respondent is entitled to any compensation for direct loss and expense, only EOT 3 and EOT 4 are applicable as the earlier two EOTs were granted outside the relevant periods. The relevant details of these two extensions are as follow:

		EOT 3 (15 July 2009)	EOT 4 (29 September 2007)
i	clause 43(a)	180 days	–
ii	clause 43(b)	–	62 days
iii	clause 43(f)	381 days	60 days
iv	completion date (extended)	24 September 2007	24 January 2008

[34] These two extensions effectively extended the completion date from 24 September 2007 (originally 12 March 2006) to 24 January 2008. With these extensions, cl 44 allowed the respondent to claim for direct loss and expense from 12 March 2006 up to the extended date of 24 January 2008 but only where the extensions were by virtue of cll 43(c), (f) or (i). This means that only the claims in respect of 441 days (381 days under EOT 3 and 60 days under EOT 4) under cl 43(f) fall within cl 44 while the remaining claims under cll 43(a) and (b) fall outside cl 44. Evidently, the latter claims cannot be considered. This position was in fact recognised by the respondent themselves as reflected in its letter dated 5 March 2007 making a claim for loss and expense under cl 43(f).

[35] However, as can be seen from the respondent's claims, only the respondent's first claim comes within this period. It is a claim for the period from 1 August 2006–21 January 2007, a total of 140 days. Regardless the number of days claimed, the respondent is required to prove all the matters identified earlier as well as the actual losses themselves.

[36] We agree with the submissions of learned counsel for the appellant that the respondent has failed to prove such entitlement. And, it is in this regard that the trial judge fell into error. First, the respondent's claims arise as a result of machines which had been left idling. It is our respectful view that the learned High Court judge failed to consider the serious discrepancies in the question of ownership of the machines, whether these machines were rented or owned by the respondent. The respondent's witness, PW1 had testified that the respondent owned the machines. Yet, the respondent claimed rentals of which exact details were not available for the court's evaluation. We agree with the appellant that it is neither enough nor does it serve as proof to merely quote prices from the contract. Damages must be proved in the usual manner, by tendering sufficient evidence of the amounts claimed. If no evidence is adduced, the court must dismiss the claim or grant only nominal damages — see the oft-cited decision in *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; [1990] 1 CLJ 133.

[37] What is more imperative and this is where the learned trial judge fell into the second error, is that His Lordship had failed to appreciate that the machines could not have been idling since the respondent had taken the machines out of the work site and had deployed them elsewhere — see the respondent's letters dated 11 September 2006 and 14 January 2007. Since that was the case, then there was really no loss claimable under cl 44. The deployment of the machines elsewhere was not a matter of a mitigation exercise, but a reflection of the real conditions on the ground, that there was in fact, no idling of the machines.

[38] The third error is this — we also agree with the appellant's submission that the respondent's claims for direct loss and expense were all made outside the contractually agreed time frame of one month from the date 'of the occurrence of such event or circumstance'. The respondent calculated its claim from the date of the grant of EOT. With respect, that is erroneous. The correct date, as provided under cl 44, is the date of the event which is complained of. On the assumption that there is no instruction from the SO, then it must be when it first arose. It cannot be from the date when the EOT is decided. The claims are quite clearly late and not in compliance with the terms of contract. No explanation has been proffered on why there has been non-compliance of the contractually agreed preconditions to the claim under cl 44. These notice and other requirements under cl 44 must be given a strict interpretation; the failure of which frees the appellant from considering the claims.

[39] Fourthly, and this is the peculiar case of the second and third claims for loss and expense — no extensions of time were granted and neither has the respondent asserted that time extensions ought to have been granted. That being so, it is not immediately apparent whether these claims properly arise under cll 43 and 44. The reasons relied on for these claims ought to have been examined by the learned High Court judge in order to ascertain whether the claims are validly brought.

[40] Again, the reasons offered by the respondent for the loss and expense claim was that it was awaiting instructions from the SO (AIs) on where to dispose the excavated materials. These instructions were not given until 15 March 2010.

[41] With respect, we are compelled to agree with the appellant that the evidence shows that this was not in the least the case. At the site meeting of 29 October 2008 held shortly after the machines supposedly stood idle (the respondent claimed the idling started from 22 September 2008), the respondent informed the appellant that it had not received approval or permit to buy fuel and that work will resume once such approvals or permits were procured. Nothing was raised on AIs; that the respondent was waiting for AIs.

[42] In another piece of telling evidence from the respondent themselves, a letter written on 25 January 2009 in response to the appellant's letter of 15 January 2009 reminding the respondent to resume and complete its work, the respondent explained that it could not proceed with the works because of the monsoon season and that it had several matters to settle:

> Sebagaimana yang kita sedia maklum bahawa kerja-kerja tanah tidak boleh dijalankan pada musim hujan dan sekiranya hujan berhenti ia akan mengambil masa beberapa hari untuk mengeringkan tanah kawasan tersebut.
>
> Kita juga sedia maklum bahawa hujan musim ini berpanjangan sehinggalah ke tarikh 13hb Jun 2009.
>
> Kami memohon persetujuan dari pihak tuan untuk memulakan kerja-kerja tanah selewat-lewatnya 15hb Feb 2009. Ini adalah disebabkan ada beberapa yang perlu kami selesaikan.

[43] None of the reasons given by the respondent had pertained to the reason now relied on for the loss and expense claims, that the respondent was waiting for instructions. We agree with the appellant that this reason of waiting for AIs is more in the nature of an afterthought. Consequently, the claim must be rejected.

[44] We further agree with the submissions of the appellant that this reason is actually without basis. In the earlier AI of 22 March 2007, the respondent had already been asked to submit its quotation to remove and dump the excavated organic material to an identified area. The respondent had submitted its quotation and this resulted in a consequential adjustment to the contract price vide adjustment to contract sum No 3. The appellant has paid against this adjusted price.

[45] The contents of another AI dated 15 March 2010 fortifies the appellant's position that these claims are not genuine and quite outside the terms of cl 44. In this later AI, the respondent was instructed to complete the earth filling work at the organic soil area; and to excavate the field for the preparation of a dry pond and 'tanah ditambun di kawasan tanah organik'. This led to adjustment to contract sum No 4 which has also been paid. After this AI dated 15 March 2010 was issued, the only concern raised by the respondent was the issue of renewal of its insurance. Again, there was no issue raised on awaiting instructions to identify the dump site. Obviously, this was because the site had already been identified.

[46] Given the above reasons and more where cl 44 only allows a loss and expense claim where the same 'would not be reimbursed by a payment made under any other provisions in this Contract', the evidence quite clearly reveal that none of the respondent's claims were properly within cl 44. The reason(s)

relating to waiting for instructions on the removal of excavated organic materials is not supported by the evidence. With respect to the learned High Court judge, these material factors were not considered, adequately or at all. Such failure is plainly wrong and it is trite principle that this then warrants appellate intervention.

[47] As to the award for damages of RM50,000, the respondent claimed that it had been blacklisted by the Government of Kelantan or its investment arm as a result of the termination by the appellant. In the statement of claim, a sum of RM1m was claimed as general damages whereas at trial, the respondent had sought the same sum as exemplary damages. Aside from the fact that a claim for exemplary damages must be specifically pleaded, we are of the considered view that there is actually no basis for this award. We are unable to agree with the respondent that the court ought to infer that the respondent had been blacklisted by the Government of Kelantan or by the appellant, without more. In the case of *Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor*, the Court of Appeal remitted the matter back to the trial court for assessment. We are not inclined to do so because once again, this is a matter of evidence and nothing was led at trial to prove the right to this claim, let alone stand as evidence for the court to infer any loss.

[48] Consequently, we are of the unanimous view that the appeal must be allowed in part. We find no merit to intervene in the learned High Court judge's decision on the termination, that it was invalid. That decision is affirmed. However, on the award of damages, we are amply satisfied that the claims for loss and expense or idling costs by reason of delay under cl 44 have not been proved sufficiently by the respondent. We, therefore, do not award any damages. The learned High Court judge's decision on the award of damages, interests and costs is hereby set aside.

[49] As to the matter of costs, we order each party to bear its own costs. The deposit is to be refunded to the appellant.

Appeal allowed in part.

Reported by Dzulqarnain Ab Fatar